

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's Order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2)(b))

Description of Case

Criminal Jail Appeal No. 109 of 2002
AND

Criminal Jail Appeal No. 111 of 2002

Date of decision :-20.02.2006

A.F.R. (Approved for Reporting)

Not approved for reporting

Date :-20.02.2006

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Jail Appeal No. 109 of 2002

Guman Singh
S/o late Sri Tir Singh Appellant
Versus
State Respondent

AND

Criminal Jail Appeal No. 111 of 2002

Meen Bahadur
S/o late Sri Parya Singh Appellant
Versus
State Respondent

Mr. J.S. Virk learned Amicus Curiae for the appellants.

**Mr. Sudhir Chaudhary learned A.G.A. assisted by Sri
Rajeev Mohan.**

Hon'ble J.C. S. Rawat, J.

Both the criminal jail appeals have been filed against the judgment and order dated 11.4.2002 passed by Sri V.B. Rai, the then Sessions Judge, Champawat in Special S.T. No. 55/2001 and 56/2001, whereby the Sessions Judge has convicted the appellants and sentenced them to undergo RI for ten years and to pay fine of Rs.1 lakh each under section 20 of the N.D.P.S. Act. In default of payment of fine, the appellant to undergo S.I. for further two and a half years.

2) The case of the prosecution, in brief, are that on 20.5.2001 Om Prakash-Chowki Inspector alongwith police personnel was checking the vehicles and suspected persons at Sharda Barrier at about 2:15pm. They saw the appellants coming from Banbasa Baraj, Nepal and they were asked to stop but they tried to escape. The police party intercepted the appellants

and tried to conduct a search. The appellants were duly informed of their right of being searched before a Gazetted Officer or a Magistrate as required under section 50 of the Act but they declined that offer. On conducting search of the appellant Guman Singh 2kg Charas was recovered from his possession and 1 ½kg Charas was also recovered from the possession of the appellant-Meen Bahadur. The recovered Charas was sealed at the spot and prepared two separate recovery memos. On the basis of recovery, check FIR (Ex.ka.7) was lodged at the police station and entry to that effect was made in the G.D. (Ex.ka.8). The investigation was entrusted to C.S. Yadav-S.I. (PW-3), who prepared the site plan (Ex.ka.9) and the sample taken from the seized article was sent for chemical examination and on receipt of its report it was found that it was Charas. The investigation was taken up as usual which culminated into the submission of the chargesheet.

3) The charge under sections 18/20 of the N.D.P.S. Act was framed by the learned Sessions Judge against the appellant. The appellant denied the charges and claimed the trial.

4) In order to prove its case, the prosecution examined witnesses. Om Prakash (PW-1) was the Incharge-Inspector at police station Banbasa. He proved the factum of recovery of Charas from the possession of the appellants. Head Constable Inder Singh Bisht (PW2) has stated that he was present with Om Prakash (PW1) and supported the prosecution version. C.S. Yadav PW3) was the Investigating Officer and he proved the check report, G.D. and site plan. He took the investigation as usual which culminated into

the submission of the chargesheet. Vijay Kumar (PW4) was also associated with the raiding party was also examined and he also supported the prosecution version.

5) The learned Sessions Judge on the basis of his appreciation of the evidence found the appellants guilty u/s 18/20 N.D.P.S. Act and convicted and sentenced the appellants as mentioned above.

6) I have heard Sri J. S. Virk learned Amicus Curiae for the appellants and Sri Sudhir Chaudhary learned A.G.A. assisted by Sri Rajeev Mohan. I have also gone through the evidence and material on record.

7) Learned Amicus Curiae for the appellants has only contended that the Charas was recovered from the possession of the appellants on 20.5.2001. The sample of the recovered Charas was taken on 20.5.2001 and it was handed over to the Thana on the same day. Thereafter, the sample was sent on 23.5.2001 for chemical examination and on receipt of its report it was found that it was Charas. Learned Amicus Curiae for the appellants pointed out that the link evidence is missing in the case. The recovered articles were kept in the police station in a sealed cover and a sealed sample was sent for chemical examination had not been proved by the prosecution. The prosecution has failed to prove the fact that the seized articles were not tampered with during the period it remained in the custody at police station till it was produced before the court. It was further contended that the prosecution had to establish that the said articles were kept in a sealed cover and there was no chance of tampering

with it. It was further contended that Om Prakash (PW2) has clearly stated that the sealed was produced which is on record. Learned Amicus Curiae contended that the seal was not taken into custody by the I.O. during the investigation. Learned A.G.A. also conceded that there is no evidence of any witness that the said articles were sealed by him at the police station and thereafter the said articles were submitted to the court while sending the sample to the chemical examiner. Perusal of the record reveals that there is only one letter on record which shows that the said sample was produced before the court for sending it to the chemical examiner and the said letter also shows that Satya Pal had taken the sample from the court to the chemical examiner. Thereafter, the report was received on 27.8.2001. PW2 has only stated in his cross examination that he alongwith the police party reached at the police station at about 16:13 hours and handed over the appellants as well as the recovered Charas to the police station. The sample seal is not on record. He has further stated that the said seal was produced before the court today. The other evidence which was cited by the learned A.G.A. is that I.O.-C.S. Yadav (PW3) has stated that the articles and sample were sent to the Chemical Examiner and it was sent through Satya Pal. He has also stated in the cross examination that the recovered articles was kept in the police station and both were taken separately and the samples were also taken separately. No other evidence on this point has been brought to my notice during the argument. It is evident from the record that the prosecution had not adduced any oral evidence of the person who had kept the said articles in custody in the police station or who was said to have been taken the

articles to chemical examiner was not produced. Sample seal was not taken where the seized articles were kept after the arrest of the appellants. The prosecution should not have proved that it was kept in a sealed condition in the malkhana in the police station. It is also stated in the evidence that the keys of the said malkhana was kept with the malkhana Moharir. The evidence of malkhana Moharir o prove the fact that the said articles were kept in his custody and it remained in the same condition as it was handed over till it was produced before the court at the time of evidence or at the time of sending it to the chemical examiner. It is not known that who had carried it from the police station to the court. There is no link evidence which shows that the said articles were not tampered on the way from the police station to the court. The letter and the evidence of the I.O. reveals that Satya Pal has taken this sample to the chemical examiner. It was incumbent on the prosecution to examine him to show that the said articles were not tampered till it was handed over to the chemical examiner. It is also not known who had taken the charas from the police station to the court. These facts also create a doubt in the testimony of the prosecution. I am fortified with the view taken by Allahabad High Court in **Shiv Charan Vs. State A.C.C. 1999(38) p/181** in which it has been held as under:-

“6. A perusal of the record of the case shows that the prosecution had not given link evidence. It is not given link evidence. It is not known where the seized charas was kept after it was recovered from the possession of the appellant. It is also not known tht who had carried it from the place of recovery to

*the place of storage. No evidence was also adduced as to who had carried the charas in question to the Chemical Examiner. The said Charas is said to have been recovered on 11.10.1990 and the report of the chemical examiner is dated 26.8.1993 from which it appears that it was received in the office of chemical examiner by means of letter dated 5.11.1991. No evidence is given to show that the Charas in question remained intact in the sealed bag for a period of more than one year i.e. from 11.10.1990 to 5.11.1991. In view of this, it cannot be said that the same Charas was sent to the chemical examiner for his report which was recovered from the possession of the appellant. Hon/ble the Supreme Court in the case of **Valsala Vs. State of Kerala 1993 (30) ACC 605 S.C.** has held that in the absence of link evidence, the conviction under the N.D.P.S. cannot be sustained.”*

8) It has also been held in **Valsala Vs. State of Kerala 1993 Supp.(3) S.C.C. p/665** that :-

“We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be brown sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.1988 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seize article was lying and even assuming that it was in the custody of PW6, the Officer in charge of the police station who seized it, there is again nothing

to show whether it was sealed and kept there. The learned counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex. P-2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even PW6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.1998. The evidence given by PW6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. PW3, A.S.I. is supposed to have produced the same in the court. But PW3 does not say anything about this. It is only PW7 the Circle Inspector who comes into the picture at a later date, who admitted in the cross examination that the seized article was sent by PW3 (A.S.I.) to the court and PW7 in his cross examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through PW7 that the Chemical Examiner's report is marked. PW7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore, the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts

below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts cannot convict.”

9) It has been held in **State of Tamil Nadu & another Vs. Muniandi 2001 J.Cr. SC p/308** that :-

“9. The I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness PW1 and was kept him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under section 55 of the NDPS Act. The prosecution had not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser.”

10) The Hon'ble Supreme Court has observed in **State of Rajasthan Vs. Gurmail Singh 2005 SCC(Cri) p641** that :-

“2. In the first instance, though the seized articles are said to have been kept in the malkhana on 20.5.1995, the malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW6 on 5.6.1995. We further find that no sample of the seal was sent alongwith the sample to the Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles.”

11) It has also been held by this Court in **Mr. Harman Chrust Vs. State 2005(1) U.D. p/736** that the prosecution cannot prove its case against the accused without the link evidence that the seized article was not tampered with during the period it remained in the

custody at police station and thereafter at malkhana is completely missing.

12) In view of the above discussion, I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellants. I find that the learned trial court has erred in convicting and sentencing the appellants.

13) Therefore, the appeal is allowed and the conviction and sentence against the appellants awarded by the Trial court are set aside. Appellants namely Guman Singh and Meen Bahadur are in jail. They shall be released forthwith, if not wanted, in any other case.

14) Let the lower court record be sent back to the court concerned.

(J.C.S. RAWAT, J.)

Dated 20.2.2006
LSR